IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.2451 OF 2004

IN

SUIT NO.3881 OF 2003

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Kumar Vinaychandra alias
Vinodchandra Bhagat ...Plaintiff

v/s.

Smt.Rukmani Vinaychandra alias
Vindochandra Bhagat ...Defendant

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Mr.H.P.Narsana i/b Harshad & Co. for the Plaintiff.

Mr.A.J. Almeida for the Defendant.

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CORAM: D.K.DESHMUKH, J.

DATED: 24TH JUNE,2005

P.C.:

1. This Notice of Motion is taken out by the Defendant for dismissal of the suit on the ground that it is barred by the provisions of Order 2 Rule 2 of CPC. Subject matter of this civil suit is a flat in a building of a Co.operative society. The Plaintiff has instituted a suit claiming that he is co.owner of the flat along with the Defendant and therefore he has filed a suit claiming a decree for partition. He also claims a decree for sell of the flat and division of the sale-proceeds in equal proportion between the Plaintiff and the Defendant. It appears that the Defendant had filed a Civil suit No.3781 of 1993 in the City Civil Court claiming that she is sole and exclusive owner of the flat. She also claimed that the present Plaintiff is trying to disturb her possession of the flat and therefore she sought a permanent injunction restraining him from entering into the flat. It appears that while that suit was pending, the Plaintiff filed a civil suit No.6848 of 1993 in the City Civil Court claiming that he is the joint memember of the Co.operative Society,

in whose building the flat is situated. He claimed that the entire consideration for purchase of the flat was paid by him and that he is the sole owner of the property and that the Defendant has no right, title or interest in the flat. He referred to the civil suit filed by the Defendant in the City Civil Court and stated that in that suit the Defendant has obtained an exparte temporary injunction against him. He stated that the Defendant is trying to dispose of the property and therefore, in the suit he prayed for a decree of permanent injunction restraining the Defendant from disposing of the property. In that suit though he is claiming to be the sole and exclusive owner of the property, he does not seek any decree of declaration regarding his title to the suit property. It is pertinent to note here that really speaking when the Defendant filed Civil Suit No.3718 of 1993 claiming to be the sole and exclusive owner of the property, the cause of action of the Plaintiff either to claim that he is exclusive owner of the property or in the alternative to claim that he is the joint owner of the property had accrued to him and therefore when he filed Suit No.6848 of 1993 the cause of action either for claiming for decree of declaration that he is the sole owner of the property

or a decree for partition on alternate case that he is the joint owner of the property had accrued to the Plaintiff. Rule 2 of Order 2 reads as under:-

> 2.Suit to include the whole claim:- (1) Every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cuase of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.
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> (2) Relinquishment of part of claim.- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
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> (3) Omission to sue for one of several reliefs.- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the

leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

2. Perusal of the above provision shows that sub-rule 1 of rule 2 obliges the Plaintiff to include the whole of the claim which the Plaintiff is entitled to make in respect of cause of action in one suit. Sub-rule 2 lays down that where the Plaintiff omits to sue in respect of any portion of his claim, it will be treated that he has relinquished the claim and he cannot subsequently institute a suit in relation to that claim. Sub-rule 3 lays down that when a person is entitled to more than one relief in respect of the same cause of action and if he omits to claim any of the relief to which he is entitled, then he is barred from suing for that relief subsequently. Omission to sue in respect of any relief can be only with the leave of the court. If omission to sue is without seeking leave of the court, then institution of a further suit in relation to that relief is barred. In the present case, when the Defendant filed the Suit No.3781 of 1993, the cause of action of the Plaintiff to institute the suit against the

Defendant in relation to the suit property had accrued to him. On the basis of that cause of action, it was open to the Plaintiff to institute a suit claiming a relief of declaration of his exclusive title and consequently the relief of permanent injunction against the Defendant from inteferring with his possession. Before claiming that relief, it would have been necessary for the Plaintiff to claim a decree for possession of the flat against the Defendant. It was open to the Plaintiff also to take an alternate plea that he is the part owner of the property and therefore he could have sought in the alternative a decree for partition and separate possession or a decree for partition and sale of the suit property and division of the sale-proceeds in equal proportion. All these reliefs could have been claimed by the Plaintiff after Civil Suit No.3781 of 1993 was filed by the Defendant. The Plaintiff after Suit No.3781 of 1993 was filed by the Defendant, filed a Civil Suit No.6848 of 1993. In that suit, he did not claim a decree for declaration of his exclusive title. He also did not seek a decree for possession. He also did not plead his alternate case that he is joint owner of the property and did not claim a decree for

partition and for sale of the property. The only decree that was claimed in the suit was a decree for permanent injunction restraining the Defendant from selling the property. The Plaintiff could have omitted to sue for other reliefs when he filed civil Suit No.6848 of 1993 with the leave of the court. But it is common ground that no such leave was obtained by the Plaintiff, and therefore, by operation of provisions of Order 2 Rule 2 of Civil Procedure Code institution of this suit will be barred.

3. In the result, therefore, the Notice of Motion has to be granted and it is accordinly granted in terms of prayer clause (a). The Plaintiff is also directed to pay costs of this Notice of Motion to the Defendant, as incurred by the Defendant. As a result of this order, the suit stands dismissed. Office to act accordingly.

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